Supreme Court, U.S.
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No. 07- 07-138

IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

JAMES ODOM *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an association-in-fact "enterprise" under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"), must be an organization with an ascertainable structure separate and apart from that inherent in the alleged pattern of racketeering activity.

2. Whether a group of corporations can constitute an association-in-fact RICO enterprise.

STATEMENT REQUIRED BY RULE 14.1

In addition to the parties listed in the caption, the following was a defendant below and is a petitioner in this case:

Best Buy Stores, L.P.;

and the following was a plaintiff below and is a respondent in this case:

Katherine Moureaux-Maloney

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Supreme Court Rule 29.6, petitioner Microsoft Corporation states that there is no parent corporation or publicly held corporation that owns 10% or more of its stock.

Petitioner Best Buy Stores, L.P. (erroneously sued as Best Buy Co., Inc.) states that Best Buy Co., Inc. is the parent company of Best Buy Stores, L.P. As a limited partnership, Best Buy Stores, L.P. does not issue stock, so there is no publicly held corporation that owns 10% or more of its stock. There is also no publicly held corporation that owns 10% or more of Best Buy Co., Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Microsoft Corporation ("Microsoft") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The district court's opinion granting in part Petitioner's motion to dismiss was unpublished and is reproduced in the appendix ("Pet. App.") at 28a-37a. The Ninth Circuit's order granting rehearing en banc was published at 466 F.3d 747 (9th Cir. 2006) and is reproduced at Pet. App. 40a. The Ninth Circuit's opinion reversing the district court's order was published at 486 F.3d 541 (9th Cir. 2007) and is reproduced at Pet. App. 1a-27a. The Ninth Circuit's order staying the mandate pending the filing of this petition for a writ of certiorari was unpublished and is reproduced in the appendix at Pet. App. 38a.

JURISDICTION

The judgment of the Ninth Circuit was entered on May 4, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1961(4) of Title 18 to the United States Code provides that:

> [As used in this chapter,] "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity . . . .

Section 1962(c) of Title 18 to the United States Code provides that:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Section 1962(d) of Title 18 to the United States Code provides that:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Section 1964(c) of Title 18 to the United States Code provides that:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

STATEMENT OF THE CASE

In *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985), this Court observed that one of the reasons civil RICO evolved into "something quite different from the original conception of its enactors" was the failure of "the courts to develop a meaningful concept of 'pattern.'" *Id.* at 500. The present

petition arises because it is now clear—some twenty-six years after this Court's decision in *United States* v. *Turkette*, 452 U.S. 576 (1981)—that the lower courts have not developed a consistent and meaningful concept of another critical limitation in the RICO statute: the "enterprise" requirement.

This petition arises from a suit by a putative class of customers of Best Buy Stores, L.P. ("Best Buy") who allege that Microsoft and Best Buy entered into a joint marketing agreement under which trial memberships to Microsoft's MSN Internet Access service ("MSN service") were activated in their names without their knowledge when they purchased certain products from Best Buy. Plaintiffs alleged that this agreement and the actions of Microsoft and Best Buy in furtherance of this agreement constituted an association-in-fact "enterprise" under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"). The Ninth Circuit's decision, which permits this theory of liability to proceed, concededly conflicts with those of other circuits and presents two significant questions concerning the proper interpretation of a statute that is of particular importance to the business community.

The first question is whether an association-in-fact RICO enterprise must have an ascertainable structure separate and apart from what would be inherent in the alleged pattern of racketeering activity. The Ninth Circuit answered this question in the negative, concluding that an association-in-fact "enterprise" need be no more than the sum of the alleged predicate racketeering acts, thereby exacerbating a sharp split in the courts of appeals (now four to seven) on this issue. The Ninth Circuit candidly acknowledged that its holding conflicted with the decisions of the Third, Fourth, Eighth, and Tenth Circuits. Pet. App. 14a-15a. Indeed, the Ninth Circuit's decision also conflicts with the holdings of the Fifth, Sixth, and Seventh Circuits, while it is in accord with decisions of the First, Second, and Eleventh Circuits.

The Ninth Circuit's ruling effectively reads the "enterprise" element out of the statute and thereby impermissibly relaxes the limitations Congress placed on the imposition of RICO's harsh penalties. Section 1962(c)'s requirement that a defendant participate in the operation or management of an "enterprise" is a "critical limitation" on RICO that prevents it from becoming a routine vehicle for imposing civil liability; otherwise, it would be nothing more than a conspiracy or aiding and abetting statute. *Reves* v. *Ernst & Young*, 507 U.S. 170, 183 (1993). The concept of "enterprise" is central to RICO, which was enacted to eradicate *organized* crime. *Turkette*, 452 U.S. at 589. Yet the Ninth Circuit held that where an association-in-fact enterprise is alleged, no organization is required beyond that inherent in the commission of the predicate acts. Under this reading of the statute, the "enterprise" requirement is no limitation at all, at least where two corporate entities are engaged in any joint activities.

The second question meriting this Court's review is whether a group of corporations can constitute an association-in-fact RICO enterprise. Although Petitioner did not expressly raise this precise issue below (as it was previously decided by the Ninth Circuit, see *United States* v. *Blinder*, 10 F.3d 1468, 1473 (9th Cir. 1993)), Petitioner has contended throughout this litigation that the enterprise alleged is legally deficient.

The flawed view that an associated-in-fact enterprise can be made up of a group of corporations is contrary to the plain language of the statute, which defines an association-in-fact enterprise as a "group *of individuals* associated in fact." 18 U.S.C. § 1961(4) (emphasis added). Yet this erroneous interpretation is widely adopted by the lower courts and results in numerous civil suits—most of which result in settlements—predicated on a theory unsupported by the statute. There is no conflict among the lower courts on this issue, but the question is one of fundamental importance

because it frames the first question presented in this petition and it exposes virtually every business entity to potential exposure to RICO's treble damages for every joint activity with another business.

The Ninth Circuit's decision permits plaintiffs to proceed with RICO suits against corporations based on their ordinary contractual or other business relationships. If left intact, the appellate court's construction of the RICO enterprise requirement will transform vast amounts of legitimate commercial activity into conduct actionable under RICO. Expanding RICO's scope in this manner will impose significant and unintended costs on American businesses and will convert a statute designed to eradicate organized crime into a tool to induce settlements from legitimate businesses that cannot risk the possibility of an award of treble damages or the reputational injury of being subjected to suit in federal court under a statute associated with racketeers and mobsters. The Court should grant certiorari to help restore civil RICO to its proper role: that of a narrowly drawn remedy aimed at providing redress to the direct victims of organized criminal activity—not a mechanism for the extraction of windfall recoveries arising from perfectly ordinary business transactions.

1. On May 15, 2003, respondent James Odom filed a complaint in the United States District Court for the Northern District of California against Microsoft and Best Buy on behalf of a purported class of all persons "in whose names [a trial subscription to Microsoft's MSN service was] established and activated by the scanning of a Trial CD at a Best Buy store, during the period from May 15, 1999 to the present." Compl. ¶ 19. Plaintiff asserted two federal RICO claims under 18 U.S.C. § 1962(c) and (d) stemming from a joint marketing agreement between Microsoft and Best Buy under which each agreed to promote the other's products and

services.[1] Plaintiff alleged that the agreement and the actions of Microsoft and Best Buy in furtherance of the agreement constituted an "enterprise" and that the defendants conducted the affairs of this claimed "enterprise" though a pattern of racketeering activity.

2. Microsoft moved to dismiss the original complaint in the Northern District of California, arguing *inter alia* that Plaintiff failed adequately to plead a RICO enterprise. Best Buy joined in that motion. At the same time, Microsoft filed (and Best Buy joined) a separate motion to transfer the case to the Western District of Washington. The transfer motion was granted on October 1, 2003.

3. On November 19, 2003, Plaintiffs filed a First Amended Complaint ("Amended Complaint") in the Western District of Washington. Am. Compl. Plaintiffs asserted federal RICO claims under 18 U.S.C. § 1962(c) and (d), a claim under the Electronic Fund Transfer Act (15 U.S.C. § 1693), a claim under the Washington Consumer Protection Act (Wash. Rev. Code § 19.86.010), and a claim for unjust enrichment.

Plaintiffs' allegations almost exclusively focused on the actions alleged to constitute the claimed pattern of racketeering activity. Plaintiffs asserted that "[u]nder an agreement signed in April 2000, Microsoft invested $200 million in Best Buy and agreed to promote Best Buy's online store through its MSN service" and that, in exchange, "Best Buy agreed to promote MSN service and other Microsoft products in its stores and advertising." Am. Compl. ¶ 10. Specifically, Plaintiffs alleged that Best Buy would distribute to its retail customers a Trial CD that provided the customer a trial subscription to MSN service for 30 days or six months, depending on the merchandise purchased. *Id.* ¶ 11. Plaintiffs further alleged that a trial MSN service account was established in the customer's name without his or her

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[1] The complaint set forth one alleged RICO predicate act—wire fraud (18 U.S.C. § 1343).

knowledge when a Best Buy employee scanned a Trial CD at the checkout counter. *Id.* ¶¶ 12-13. At the end of the trial subscription period, Plaintiffs claimed, Microsoft would begin to charge the customer for the MSN service that the customer allegedly did not know was established. *Id.* ¶ 17.[2]

In an attempt to satisfy § 1962(c)'s requirement that the defendants conduct the affairs of an "enterprise," Plaintiffs asserted that the joint marketing agreement between Microsoft and Best Buy, "together with Defendants' activities in furtherance of the agreement, constitute an 'enterprise.'" Am. Compl. ¶ 34. In addition, Plaintiffs alleged that:

> [t]he material decisions guiding the operation of this enterprise—including but not limited to decisions concerning the form and content of campaigns, advertising, and other vehicles used by either Defendant to promote the other's products and services pursuant to their agreement (and including the design and implementation of the mechanisms through which MSN accounts are established by the swiping of a Best Buy customer's credit or debit card and the scanning of a Trial CD)—are made by Defendants jointly.

Id. ¶ 35. Plaintiffs further claimed that "Best Buy receives a flat payment" as well as "a portion of each monthly MSN charge paid by the customer" from Microsoft. *Id.* ¶ 38.

4. Microsoft and Best Buy filed separate motions to dismiss the Amended Complaint in the Western District of Washington arguing *inter alia* that Plaintiffs' RICO claims should be dismissed because their allegations failed to plead the existence of a cognizable enterprise. On March 16, 2004, the district court dismissed with prejudice Plaintiffs' RICO claims, holding that they did not allege the existence of an

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[2] While the allegations in the Amended Complaint must be taken as true at this stage, Fed. R. Civ. P. 12(b)(6), Microsoft denies any illegal conduct.

enterprise separate and distinct from the alleged racketeering activity. Pet. App. 34a Thereafter, Plaintiffs voluntarily dismissed their remaining non-RICO claims. On May 18, 2004, the district court entered final judgment for the defendants on the RICO claims.

5. A divided Ninth Circuit, sitting *en banc*, reversed the district court's judgment. Pet. App. 21a. Although a panel of the Ninth Circuit previously held that an association-in-fact enterprise must have an ascertainable organizational existence separate and distinct from that inherent in the alleged pattern of racketeering activity, see *Chang* v. *Chen*, 80 F.3d 1293 (9th Cir. 1996), the majority opinion rejected any such requirement, holding that RICO plaintiffs need not allege that the claimed enterprise had any organizational structure beyond that necessary to commit the alleged acts of racketeering. Pet. App. 17a. Because in this case Plaintiffs alleged that Microsoft and Best Buy "had a common purpose of increasing the number of people using Microsoft's Internet Service," "formed a vehicle for the commission of at least two predicate acts of fraud," and operated under the joint marketing agreement for two years, the Ninth Circuit concluded that Plaintiffs adequately pled an association-in-fact RICO enterprise. *Id.* at 19a-20a.

The majority expressly acknowledged the deeply divided and mature split among the circuits and that its holding conflicted with the decisions of at least four other circuits. Pet. App. 14a-15a (citing decisions from the Third, Fourth, Eighth, and Tenth Circuits). Although the precise formulations vary, each of these circuits interpreted Section 1962(c) and this Court's decision in *United States* v. *Turkette* to require an association-in-fact enterprise to have an ascertainable organizational existence separate and distinct from the alleged pattern of racketeering activity. See *Asa-Brandt, Inc.* v. *ADM Investor Servs., Inc.*, 344 F.3d 738, 752 (8th Cir. 2003) ("enterprise must have ... an ascertainable structure distinct from the pattern of racketeering"); *United*

States v. *Sanders*, 928 F.2d 940, 944 (10th Cir. 1991) ("enterprise" must have "an ascertainable structure that exist[s] apart from the commission of racketeering acts"); *United States* v. *Tillett*, 763 F.2d 628, 632 (4th Cir. 1985) (to allege an "enterprise," a plaintiff must "show that the organization had an existence beyond that which was necessary to commit the predicate crimes" (citations omitted)); *United States* v. *Riccobene*, 709 F.2d 214, 223-24 (3d Cir. 1983) ("enterprise" must have "an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses").

The majority disagreed with these circuits' reading of *Turkette*, holding that this Court's statement that an "enterprise" is "an entity separate and apart from the pattern of activity in which it engages," *Turkette*, 452 U.S. at 583, "is merely a statement of the obvious: The enterprise and its activity are two separate things. One is the enterprise. The other is its activity." Pet. App. 17a. The majority also concluded that a requirement that an enterprise have an ascertainable structure distinct from that necessary to commit the alleged racketeering acts "would necessitate that the enterprise have a structure to serve both illegal racketeering activities as well as legitimate activities." *Id.* at 18a. Accordingly, the Ninth Circuit joined what it considered to be the four circuits that have rejected such a requirement. *Id.* at 17a (citing decisions from the First, Second, Eleventh, and District of Columbia Circuits).[3]

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[3] The majority opinion concluded that there was an even split among the circuits. But the majority did not properly recognize that the Fifth, Sixth, and Seventh Circuits have each held that an enterprise must have an ascertainable separate structure. *Atkinson* v. *Anadarko Bank & Trust Co.*, 808 F.2d 438, 441 (5th Cir. 1987) ("Plaintiffs wholly failed to establish the existence of any entity separate and apart from the bank."); *Richmond* v. *Nationwide Cassel L.P.*, 52 F.3d 640, 644 (7th Cir. 1995) ("There must be 'a structure and goals separate from the predicate acts themselves.'") (quoting *United States* v. *Korando*, 29 F.3d 1114, 1117 (7th Cir. 1994)); *United States* v. *Johnson*, 440 F.3d 832, 840 (6th Cir.) ("'The hallmark of

Seven of the fifteen judges, although concurring in the ultimate result because they believed Respondents should be permitted to attempt to replead the existence of a separate enterprise, disagreed that Plaintiffs' allegations in the existing Amended Complaint gave rise to liability under RICO. Noting that "Odom's complaint narrowly defines the 'enterprise' as only the marketing agreement between Best Buy and Microsoft together and their activities in furtherance of that agreement," five judges rejected the proposition that "if two parties perform a series of 'predicate acts' for each other's benefit pursuant to a commercial agreement, they *ipso facto* constitute an 'enterprise.'" Pet. App. 25a (Silverman, J., concurring in the result). Rather, citing the purpose of RICO—the eradication of *organized* crime—these judges argued that, to constitute a RICO enterprise, a group of persons associated in fact must have at least "some minimal structure, coordination, or ordering principle to distinguish them from a run-of-the-mill conspiracy." *Id.* Two other judges stated that "[i]t strikes [us] as outlandish that what Judge Silverman correctly describes as a 'marketing contract' between Microsoft and Best Buy could subject them to a private RICO action." *Id.* at 27a (Bybee, J., concurring in the result).

The Ninth Circuit stayed its mandate pending the filing of this petition for a writ of certiorari. Pet. App. 38a.[4]

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an enterprise is structure .... [T]here must be some structure, to distinguish an enterprise from a mere conspiracy ....'") (quoting *United States* v. *Rogers*, 89 F.3d 1326, 1337 (7th Cir. 1996)), *cert. denied*, 127 S. Ct. 48 (2006). Also erroneous is the majority's inclusion of the D.C. Circuit among the list of circuits that reject the requirement of a separate and ascertainable structure. The case cited, *United States* v. *Perholtz*, 842 F.2d 343, 363 (D.C. Cir. 1988), did not address this issue, instead concerning itself with the different question of whether an enterprise must be proven with *separate evidence* from the evidence of the predicate acts.

[4] The Ninth Circuit denied Plaintiffs' motion for reconsideration of the order staying the mandate on June 28, 2007. Pet. App. 39a.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT ON WHETHER A RICO ENTERPRISE MUST HAVE AN ASCERTAINABLE ORGANIZATIONAL EXISTENCE SEPARATE AND DISTINCT FROM THE ALLEGED PATTERN OF RACKETEERING ACTIVITY.

This case presents the question whether an association-in-fact RICO "enterprise" must have an ascertainable, and ongoing, organizational structure separate and apart from what would be inherent in the alleged pattern of racketeering. See 18 U.S.C. § 1962(c). The Ninth Circuit's conclusion that it need not is consistent with rulings of the First, Second, and Eleventh Circuits. These decisions, however, directly conflict with the conclusions of the Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits. Indeed, the Ninth Circuit itself acknowledged a deep and irreconcilable split among the circuits and that its holding conflicted with the decisions of at least four other circuits. Pet. App. 14a-15a. That is reason enough for this Court to grant certiorari.

Section 1962(c) makes it "unlawful for any person employed by or associated with any *enterprise* . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c) (emphasis added). RICO also makes it unlawful for any person to conspire to violate any provision of this subsection. *Id.* § 1962(d). The statute defines the term "enterprise" as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* § 1961(4).

This Court previously considered the definition of an association-in-fact enterprise. In *United States* v. *Turkette*, the defendants were accused of conducting the affairs of a RICO enterprise described as a group of individuals

associated in fact for the purpose of engaging in a pattern of racketeering activity involving illegal drug trafficking, arson, and other crimes. See 452 U.S. 576, 579 (1981). The First Circuit held that the definition of "enterprise" was limited to legitimate enterprises and did not encompass an association that performed only illegal acts and that had not infiltrated a legitimate enterprise. See *id.* at 579-80. Reading the statute to apply only to legitimate enterprises was necessary, the First Circuit reasoned, to avoid an interpretation of the statute under which a "pattern of racketeering" can, without more, be an "enterprise." See *id.* at 582.

This Court reversed, holding that the term "enterprise" includes both legitimate and illegitimate enterprises. See *id.* at 587. Rejecting the First Circuit's premise that reading the statute to encompass wholly criminal enterprises would necessarily "mean that a 'pattern of racketeering activity' is an 'enterprise,'" this Court stressed that whether legitimate or criminal, "[t]he existence of an enterprise at all times remains a separate element" from the existence of a pattern of racketeering activity. *Id.* at 583.

The Court described the attributes of an associated-in-fact enterprise, and distinguished it from a "pattern of racketeering activity," as follows:

> The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. 18 U.S.C. § 1961(1) (1976 ed., Supp. III). The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise.

Id.

Although recognizing that the evidence "used to establish these separate elements may in particular cases coalesce," this Court held that "proof of one does not necessarily establish the other. The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages." *Id.*

After *Turkette*, the Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits held that a RICO enterprise must have an ascertainable structure and organization separate and distinct from the alleged acts of racketeering because, absent such a requirement, the "enterprise" element of the offense would be interchangeable with the "pattern of racketeering" element and could be satisfied merely by alleging the existence of a conspiracy among the defendants. The Ninth Circuit in the decision below and the First, Second, and Eleventh Circuits disagreed. In those circuits, any loose affiliation of defendants (including a simple conspiracy) is enough to constitute a RICO enterprise.

The Ninth's Circuit's view that a separate ascertainable structure requirement "would necessitate that the enterprise have a structure to serve both illegal racketeering activities as well as legitimate activities," Pet. App. 18a, echoes that of the First Circuit, which rejected such a requirement because "Congress intended the term 'enterprise' to include both legal and criminal enterprises, and because the latter may not observe the niceties of legitimate organizational structures." *United States* v. *Patrick*, 248 F.3d 11, 19 (1st Cir. 2001) (citations omitted). The Eleventh Circuit also rejected any such requirement, holding that a RICO enterprise may be made up of "any group of individuals 'whose association, however loose or informal, furnishes a vehicle for the commission of two or more predicate crimes.'" *United States* v. *Cagnina*, 697 F.2d 915, 921 (11th Cir. 1983). Similarly, the Second Circuit "upheld application of RICO to situations where the enterprise was, in effect, no more than the sum of

the predicate racketeering acts." *United States* v. *Bagaric*, 706 F.2d 42, 56 (2d Cir. 1983).

The Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits disagree with this view, holding that an enterprise must be an organization with an ascertainable structure that is separate and apart from that inherent in the pattern of racketeering activity. See *United States* v. *Johnson*, 440 F.3d 832, 840 (6th Cir.), *cert. denied*, 127 S. Ct. 48 (2006); *United States* v. *Sanders*, 928 F.2d 940, 944 (10th Cir. 1991); *United States* v. *Masters*, 924 F.2d 1362, 1367 (7th Cir. 1991); *Atkinson* v. *Anadarko Bank & Trust Co.*, 808 F.2d 438, 441 (5th Cir. 1987); *United States* v. *Tillett*, 763 F.2d 628, 632 (4th Cir. 1985); *United States* v. *Riccobene*, 709 F.2d 214, 223-24 (3d Cir. 1983); *United States* v. *Bledsoe*, 674 F.2d 647, 663 (8th Cir. 1982).

These Circuits base their conclusions on two related rationales. First, the broad interpretation espoused by the First, Second, Eleventh, and now Ninth Circuits would effectively render the "enterprise" element of the statute superfluous. "If the 'enterprise' is just a name for the crimes the defendants committed, or for their agreement to commit these crimes ..., two statutory elements—enterprise and pattern—would be collapsed into one." *Masters*, 924 F.2d at 1367 (citations omitted); see *Bledsoe*, 674 F.2d at 664. Such a result, these courts held, would be incongruous given the "central role of the concept of enterprise under RICO." *United States* v. *Neapolitan*, 791 F.2d 489, 500 (7th Cir. 1986); see *Riccobene*, 709 F.2d at 221; *United States* v. *Anderson*, 626 F.2d 1358, 1368 (8th Cir. 1980).

Second, this broad definition would equate the term "enterprise" with conspiracy, a result not intended by Congress. "A comparison of the severe penalties authorized by RICO with those for conspiracy indicates that the Act must have been directed at participation in enterprises consisting of more than simple conspiracies to perpetrate the predicate acts of racketeering." *Bledsoe*, 674 F.2d at 664 (comparing 18

U.S.C. § 1963(a) with 18 U.S.C. § 371). This interpretation is also untenable because it would render § 1962(d), which makes it unlawful to conspire to violate § 1962(c), a prohibition on conspiracies to conspire. *Anderson*, 626 F.2d at 1368; see *Riccobene*, 709 F.2d at 221.

Indeed, the language and structure of the RICO statute suggest that, despite the apparent breadth of the definition in 18 U.S.C. § 1961(4), an "enterprise" must be more than a joint or coordinated undertaking by two or more persons. As the Eighth Circuit reasoned in *United States* v. *Bledsoe*:

> The crime defined in 18 U.S.C. § 1962(c) involves two modes of association with an enterprise. In order to violate the provision, an individual must be "employed by or associated with" an enterprise and must "participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." Construing the statute to give effect to all its words, it requires an association with an enterprise which is distinct from participating in the conduct of the enterprise through a pattern of racketeering activity. In order for such association, for example, formal membership in or employment by a legitimate organization or their equivalent in a criminal group, to exist, the enterprise must be more than an informal group created to perpetrate the acts of racketeering.

674 F.2d at 663 (footnote omitted). It is significant that the statute says "associated with" an enterprise. It does not say "associated in an enterprise." The enterprise must therefore be something more than, and distinct from, the persons who comprise it and the acts they allegedly commit.

Thus, the Eighth Circuit held that an alleged association-in-fact enterprise consisting of two county administrators and a salesman who allegedly conspired to submit and approve payment of bogus invoices for merchandise never received by the county does not satisfy the "enterprise" requirement.

Anderson, 626 F.2d at 1362. Noting that "[a] contrary interpretation would alter the essential elements of the offense as determined by Congress" by conflating the "enterprise" and "pattern of racketeering" elements, *id.* at 1365, the Eighth Circuit held that the term "enterprise" encompasses "'only an association having an ascertainable structure ... that has an existence that can be defined apart from the commission of the predicate acts constituting the pattern of racketeering activity.'" *Id.* at 1372.

The Fifth Circuit similarly rejected an alleged association-in-fact enterprise made up of a bank, its holding company, and three employees who purportedly conspired to charge excessive interest rates. See *Atkinson*, 808 F.2d at 440-41. Holding that an enterprise must be an entity separate and apart from the pattern of activity in which it engages, the Fifth Circuit rejected the plaintiffs' claim that this purported enterprise had an ascertainable separate structure because "there was no evidence that the bank, its holding company, and the three employees were associated in any manner apart from the activities of the bank." *Id.*

The Seventh Circuit likewise rejected allegations of an associated-in-fact enterprise that, although sufficient to demonstrate a conspiracy, contained nothing to show that those associating together comprised or created an ascertainable organization. See *Bachman* v. *Bear, Stearns & Co.*, 178 F.3d 930, 931-32 (7th Cir. 1999) (holding that an alleged association-in-fact of the plaintiff's former employer, its parent company, a corporate majority shareholder, two officers and an investment company, all of whom supposedly acted in concert to defraud the plaintiff over a period of several years, might be enough to state a conspiracy, but was insufficient for a RICO enterprise because there was nothing to show that these associates were an organization). See also *Johnson*, 440 F.3d at 840 ("'The hallmark of an enterprise is structure .... [T]here must be some structure, to distinguish an enterprise from a mere conspiracy ....'") (quoting *United*

States v. *Rogers*, 89 F.3d 1326, 1337 (7th Cir. 1996)); *Neapolitan*, 791 F.2d at 550 ("While the hallmark of conspiracy is agreement, the central element of an enterprise is structure. An enterprise must be more than a group of people who get together to commit a 'pattern of racketeering activity.'").

The Third, Fourth, Sixth, and Tenth Circuits also endorsed the distinct organizational existence requirement. See *Riccobene*, 709 F.2d at 221-24 (to avoid the danger that "federal prosecutors could use the law to invoke an additional penalty whenever they had a case involving the commission of two offenses that, coincidentally, were among those listed as 'racketeering activities,'" the term "enterprise" must have "an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses"); *Tillett*, 763 F.2d at 632 (to allege an "enterprise," a plaintiff must "show that the organization had an existence beyond that which was necessary to commit the predicate crimes" (citations omitted)); *Sanders*, 928 F.2d at 944 ("enterprise" must have "an ascertainable structure that exist[s] apart from the commission of racketeering acts").

The stark conflict between the decisions of the First, Second, Ninth, and Eleventh Circuits and those of the Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits on whether an association-in-fact RICO enterprise must have an ascertainable structure and organization separate and apart from that inherent in the pattern of racketeering activity is an issue of national importance that warrants this Court's review. The broad definition of "enterprise" adopted by the First, Second, Ninth, and Eleventh Circuits would create a drastic and unwarranted expansion of RICO civil liability into an area far afield from the initial purpose of the statute. While it is true that RICO is applied in circumstances different from its initial purpose "to attack the 'infiltration of organized crime and racketeering into legitimate organizations,'" *Reves* v. *Ernst & Young*, 507 U.S. 170, 185 (1993) (quoting S. Rep.

No. 91-617, at 76 (1969)), RICO is clearly not designed as a general civil liability remedy to be used to obtain treble damages against corporations engaged in ordinary contractual business activities. To the contrary, the requirements of § 1962(c), including the enterprise requirement, are "critical limitation[s]" on the applicability of RICO. *Id.* at 183.

Because it allows plaintiffs to plead an association-in-fact enterprise in any case in which there is coordinated activity among businesses, this expansive definition of "enterprise" all but eliminates the enterprise requirement from the statute. Under this standard, any company that engages in a co-marketing arrangement, enters into a distribution agreement, or has any contractual relationship with another company could be alleged to have participated in an "enterprise" designed to engage in the marketing, distribution, or other contractual activity. The rule, in effect, would make a broad range of routine corporate conduct actionable under RICO.[5] This dramatic increase in potential corporate RICO liability with its draconian remedies warrants review.

II. THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS THE THRESHOLD QUESTION OF WHETHER A GROUP OF CORPORATIONS CAN CONSTITUTE AN ASSOCIATION-IN-FACT ENTERPRISE.

The Court should also grant review to consider an antecedent misinterpretation of RICO's enterprise definition that has gained wide acceptance among lower courts: the flawed view that a group of corporations can constitute an association-in-fact enterprise. Although previously adopted by the Ninth Circuit, see *United States* v. *Blinder*, 10 F.3d

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[5] Moreover, the disagreement among federal appellate courts on this question presents a significant risk of forum shopping. Corporations targeted by civil RICO actions often do business in several states, and this circuit split means that the same corporation would be subject to different liability in different states.

1468, 1473 (9th Cir. 1993), and thus not explicitly contested below, this view is clearly wrong. RICO's definition provides that "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of *individuals* associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (emphasis added). It is plain—both from ordinary meaning and the structure of the statute itself—that the "group of *individuals* associated in fact" refers only to groups of natural persons, not groups of corporations. See *Webster's Third International Dictionary of the English Language* 1152 (1969) (defining "individual" as "a single human being as contrasted with a social group or institution"); 18 U.S.C. § 1961(4) (listing at outset of definition "individual" separately from other entities, including "corporation").

The Court considered this question two terms ago but chose not to resolve it, apparently because it was not raised explicitly in the petition for certiorari. See *Mohawk Indus., Inc.* v. *Williams*, 126 S. Ct. 2016 (2006).[6] In that case, the focus was on whether the definition of "enterprise"—in light of its introduction by the term "includes"—was comprehensive or instead merely provided a list of examples that could be judicially expanded upon. As this Court recognizes, "the term 'includes' may sometimes be taken as synonymous with 'means,'" and thus as introducing a comprehensive list. *Helvering* v. *Morgan's, Inc.*, 293 U.S.

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[6] At oral argument in *Mohawk*, Chief Justice Roberts commented that "it does seem kind of strange to encompass [corporations] under the term individuals when the same statute uses individuals and corporations separately." Tr. Oral Arg. at 29, *Mohawk Indus., Inc.* v. *Williams*, 126 S. Ct. 2016 (2006) (No. 05-465). *See also id.* at 32 (Kennedy, J.) ("A person is defined—in sub (3) just above it. A person includes any individual or entity. Then the next thing [§ 1961(4)] says [is] individual. So it's not a—it doesn't sound like a corporation."); *id.* at 51 (Souter, J.) (noting the "peculiarity of the definition" of enterprise, which lists "A, B, C, and D, and then it repeats one, but only one, of the items on the list and says groups of these items, i.e., individuals, are included").

121, 125 (1934). The structure of RICO provides powerful evidence that Congress used "includes" to introduce comprehensive definitions.[7]

A reading of § 1961(4) to mean what it says accords with the "two aims" of RICO: "to make it unlawful for *individuals* to function as members of organized criminal groups" and "to stop organized crime's infiltration of legitimate businesses." S. Alito, Jr., *Racketeering Made Simple(r), in The RICO Racket* 1, 3-4 (G. McDowell ed., 1989) (emphasis added). Expanding the meaning of "group of individuals" to encompass corporations takes RICO well beyond these purposes. Such an expansion threatens to "RICO-ize, with its treble damages and private plaintiffs and everything, vast amounts of ordinary commercial activity." Tr. Oral Arg. at 44-45, *Mohawk*, 126 S. Ct. 2016 (2006) (No. 05-465) (Breyer, J.).

The circuit courts' rationales for "RICO-izing" groups of corporations are unpersuasive. For instance, the Eleventh Circuit baldly held that "a group of corporations can be a 'group of individuals associated in fact.'" *United States* v. *Navarro-Ordas*, 770 F.2d 959, 969 n.19 (11th Cir. 1985). See also *United States* v. *Feldman*, 853 F.2d 648, 655-56 (9th Cir. 1988). Others grafted language onto § 1961(4) that is plainly not there. See *Bunker Ramo Corp.* v. *United Bus. Forms, Inc.*, 713 F.2d 1272, 1285 (7th Cir. 1983) (adding to end of enterprise definition "and any combination of them"); *United States* v. *Thevis*, 665 F.2d 616, 625 (5th Cir. 1980) (approving of "enterprise" consisting of "'a group of individuals

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[7] Justice Alito commented on this point at oral argument in *Mohawk*, asking:

> Why shouldn't includes here be read to mean means when that seems to be the way it's used in other subsections of this provision and when the only thing that seems to be ... omitted from the list is what's involved here, which is a group consisting of a corporation or ... other legal entity ... and natural persons.

Tr. Oral Arg. at 4, *Mohawk*, 126 S. Ct. 2016 (No. 05-465).

associated in fact with various corporations'"). Other courts simply relied on the term "includes"—without any analysis of whether "includes" was used elsewhere in RICO to introduce comprehensive definitions. See, *e.g.*, *Masters*, 924 F.2d at 1366; *Thevis*, 665 F.2d at 625; *United States* v. *Perholtz*, 842 F.2d 343, 354 (D.C. Cir. 1988); *United States* v. *Huber*, 603 F.2d 387, 394 (2d Cir. 1979).

The courts of appeals may be unanimous on this point, but they are unanimously wrong and their reasoning, which has been quite sparse, does not withstand scrutiny.[8] As a result, numerous civil suits are predicated upon a theory that lacks support in the statute.

Nothing in its text, legislative history, or purpose indicates that RICO was intended to apply to groups of corporations. Indeed, RICO was intended to *protect* businesses from organized crime, not to impose onerous burdens on them. See 116 Cong. Rec. 600, 602 (1970) (remarks of Sen. Hruska) (RICO was "designed to remove the influence of organized crime from legitimate businesses by attacking its property interests and by removing its members from control of legitimate business[]"). Yet because of the potential for plaintiffs to extract windfall recoveries, the statute increasingly is used against legitimate businesses.

A civil action under RICO is "an unusually potent weapon—the litigation equivalent of a thermonuclear device." *Miranda* v. *Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991). The Ninth Circuit's holding in this case serves only to further arm those who would attempt to extract settlements from legitimate businesses that cannot risk the possibility of being labeled as racketeers or subjected to an award of treble damages. RICO was never intended to be—and is not—a general criminal conspiracy statute or basis for

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[8] At oral argument in *Mohawk*, the United States acknowledged that "the analysis doesn't tend to be lengthy." *See* Tr. Oral Arg. at 50-51, *Mohawk*, 126 S. Ct. 2016 (2006) (No. 05-465).

invoking federal jurisdiction over alleged consumer protection claims. This Court should grant certiorari to correct this misinterpretation of RICO and restore association-in-fact enterprises to the scope Congress intended.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

[Filed MAY 4, 2007]

No. 04-35468.

JAMES ODOM,
Plaintiff-Appellant,

v.

MICROSOFT CORPORATION, a Washington corporation;
BEST BUY CO., INC., a Minnesota corporation,
Defendants-Appellees.

Argued and Submitted Dec. 13, 2006
Filed May 4, 2007

Appeal from the United States District Court for the Western District of Washington; Marsha J. Pechman, District Judge, Presiding. D.C. No. CV-03-02976-MJP.

Before: MARY M. SCHROEDER, *Chief Circuit Judge*, STEPHEN REINHARDT, DIARMUID F. O'SCANNLAIN, PAMELA ANN RYMER, MICHAEL DALY HAWKINS, SIDNEY R. THOMAS, BARRY G. SILVERMAN, WILLIAM A. FLETCHER, RAYMOND C. FISHER, RICHARD A. PAEZ, MARSHA S. BERZON, RICHARD C. TALLMAN, JOHNNIE B. RAWLINSON, JAY S. BYBEE, and CARLOS T. BEA, *Circuit Judges*.

Opinion by Judge WILLIAM A. FLETCHER; Concurrence by Judge SILVERMAN; Concurrence by Judge BYBEE.WILLIAM A. FLETCHER, *Circuit Judge*:

Putative class action plaintiffs appeal from the dismissal of their suit under Federal Rule of Civil Procedure 12(b)(6) for failure to allege an "associated in fact" "enterprise" under RICO and, in the alternative, under Federal Rule of Civil Procedure 9(b) for failure to plead wire fraud with particularity. The district court dismissed with prejudice and without leave to amend.

We reverse and remand.

I. Background

Named plaintiff James Odom—then the only plaintiff—filed the first complaint in this action in the Northern District of California, alleging that defendants Microsoft and Best Buy had violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(c) and (d). Odom alleged that in April 2000 defendants entered into an agreement under which "Microsoft invested $200 million in Best Buy and agreed to promote Best Buy's online store through its MSN service." MSN is a division of Microsoft offering Internet access services. In return, "Best Buy agreed to promote MSN service and other Microsoft products in its stores and advertising." Odom alleged that pursuant to their agreement, Best Buy employees distributed different Microsoft compact discs ("Trial CDs") depending on what the customer purchased. For example, a customer who purchased a computer would receive a Trial CD providing a free six-month subscription to MSN. A customer who purchased a cell phone would receive a Trial CD providing a free thirty-day subscription.

Odom alleged that if the customer was paying by debit or credit card the Best Buy employee would scan the Trial CD. If asked why the Trial CD had been scanned, the Best Buy

employee would claim it was for "inventory control or otherwise misrepresent[ ] the purpose of the scanning." Odom alleged that what this scanning actually did was send the information to Microsoft. Microsoft would then, without the customer's knowledge or permission, activate an MSN account in the customer's name. If the customer did not cancel the account before the expiration of the free trial period, Microsoft would start billing the debit or credit card number. Odom further alleged that when customers called to dispute these charges, Microsoft directed some of them to "seek relief from their debit or credit card issuers."

Odom alleged that the "policies and practices by Best Buy and its employees relating to distribution of the Trial CDs—including but not limited to the deliberate failure to make disclosures and making of misrepresentations—have been formulated and implemented by Best Buy jointly with Microsoft, by agreement with Microsoft, and/or with Microsoft's knowledge and approval for the benefit of both Best Buy and Microsoft." Odom alleged that no affected customer had been fully compensated for his or her losses, defined as (1) a full refund of the unauthorized charges; (2) a full refund of the accrued finance charges; (3) payment of interest on the money during the time it was held by Microsoft; and (4) compensation for the "time, effort, and expense" incurred in cancelling MSN accounts and seeking refunds. Odom alleged that these losses resulted from defendants' actions taken pursuant to their agreement.

Odom alleged that he purchased a laptop computer by credit card from a Best Buy store in Contra Costa County, California, in May 2002. He alleged that he told the Best Buy employee that he did not need the Trial CD because he already had another Internet service, and that the Best Buy employee did not tell him that an MSN account with Microsoft was being established in his name or that any financial obligation was being imposed on him. He further alleged that

he never used the free six-month service that came with his computer purchase. After the six-month period, Microsoft began charging his account. Odom alleged that when he noticed the charges he called Microsoft and cancelled the service.

Odom alleged that defendants' acts constituted violations of civil RICO, 18 U.S.C. §§ 1962(c) and (d). Odom alleged that Best Buy and Microsoft, acting together pursuant to their agreement, constituted an associated-in-fact enterprise under RICO; that their actions, involving "thousands" of consumers, constituted a "pattern of racketeering activity" under RICO; and that they committed the RICO "racketeering activity" predicate act of wire fraud in violation of 18 U.S.C. § 1343.

Microsoft, joined by Best Buy, moved to dismiss under Rule 12(b)(6) for failure to allege an associated-in-fact enterprise, and under Rule 9(b) for failure to plead wire fraud with particularity. Microsoft also moved to transfer the case from California to the Western District of Washington based on a forum selection clause contained in the MSN subscriber agreement. The California district court transferred the case to Washington without ruling on the motion to dismiss. After transfer, Microsoft withdrew its motion to dismiss based on Odom's indication that he intended to amend the complaint.

An amended complaint was filed on November 19, 2003. Odom continues as a plaintiff. He adds slightly more detail to the allegations made in the first complaint. He now specifies that the Best Buy store was in Pleasant Hill, California, rather than merely in Contra Costa County. He further alleges that Microsoft billed his credit card account for two months after the expiration of the six-month period, that he has paid these credit card charges, and that he has not received any refund or credit for these charges.

Katherine Moureaux-Maloney was added as a second plaintiff. Moureaux-Maloney alleges that in September 2001 she purchased a cell phone and a cell phone service plan at a Best Buy store in Reno, Nevada, using a debit card. She alleges that a Best Buy employee scanned a Trial CD and swiped her debit card, thereby sending the information to Microsoft and establishing a thirty-day trial subscription in her name. The employee did not tell Moureaux-Maloney that this was being done. Moureaux-Maloney did not know she had this service and never used it. After the thirty days elapsed, Microsoft withdrew monthly MSN charges from Moureaux-Maloney's debit card account for seventeen months without her knowledge or authorization. In November 2003, Moureaux-Maloney received a bill from Microsoft for monthly MSN charges for April, May, and June 2003 after "Microsoft was unable to continue withdrawing the charges from her debit card account." Upon receiving this bill, Moureaux-Maloney and her husband immediately contacted Microsoft and discovered that the MSN account had been established in her name through Best Buy. Upon reviewing her bank statements, she discovered the withdrawals Microsoft had made for seventeen months. Finally, Moureaux-Maloney alleges that she "has not received any refund for any of the MSN charges that Microsoft withdrew from her debit card account, and Microsoft continues to seek payment from her of MSN charges for April, May, and June 2003."

Plaintiffs expanded the enterprise-related allegations in the first complaint by further describing the agreement between Microsoft and Best Buy. The amended complaint contains the following addition:

> In Defendants' own words (in a joint press release), this agreement is "a comprehensive strategic alliance that encompasses broadband, narrowband, in-store and online efforts"; "provides for significant joint marketing in Best Buy's retail stores, online and through print/

> broadcast vehicles, profit sharing, the promotion of BestBuy.com to the 40 million users throughout Microsoft's properties, and technology assistance"; and pursuant to which "MSN™ Internet access and Microsoft's full range of connectivity solutions will be demonstrated and sold at the more than 350 Best Buy stores in the U.S. and through BestBuy.com," and "Best Buy and BestBuy.com will receive prominent and preferred placement across Microsoft Properties, including MSNBC, and the Expedia.com™ travel service, Hotmail™ Web-based e-mail service, WebTV Network™, and the newly launched MSN eShop online shopping service."

Microsoft and Best Buy again moved to dismiss the RICO claims under Rule 12(b)(6) and Rule 9(b). The district court dismissed the amended complaint on both grounds without leave to amend. It held that an associated-in-fact enterprise had not been alleged within the meaning of RICO under Rule 12(b)(6), and that wire fraud had not been pled with particularity under Rule 9(b). Plaintiffs then voluntarily dismissed their non-RICO claims in order to allow entry of final judgment. Plaintiffs appeal the dismissal of their RICO claims.

II. Standard of Review

We review de novo a dismissal for failure to state a claim under Rule 12(b)(6). *Cervantes v. United States*, 330 F.3d 1186, 1187 (9th Cir.2003). We read the complaint in the light most favorable to the non-moving party. Allegations in the complaint, together with reasonable inferences therefrom, are assumed to be true for purposes of the motion. *Associated Gen. Contractors v. Metro. Water Dist.*, 159 F.3d 1178, 1181 (9th Cir.1998). A dismissal for failure to state a claim pursuant to 12(b)(6) should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 248 (9th Cir. 1997) (internal quotation marks omitted) (quoting *Conley v.*

Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)); *see also* Fed.R.Civ.P. 8(a).

We review de novo dismissals for failure to plead with particularity under Rule 9(b). *In re Daou Sys., Inc.*, 411 F.3d 1006, 1013 (9th Cir.2005), *cert. denied*, --- U.S. ----, 126 S.Ct. 1335, 164 L.Ed.2d 51 (2006).

III. Discussion

A. RICO

The Racketeer Influenced and Corrupt Organizations ("RICO") Act, passed in 1970 as Title IX of the Organized Crime Control Act, provides for both criminal and civil liability. Pub.L. No. 91-452, § 901, 84 Stat. 922 (1970) (codified at 18 U.S.C. §§ 1961-1968). Civil RICO provides for treble damages. 18 U.S.C. § 1964(c). There has been some judicial resistance to RICO, manifested in narrow readings of its provisions by lower federal courts. In four notable cases, the Supreme Court has corrected these narrow readings.

The first case was *United States v. Turkette*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981), which we discuss in detail later in this opinion. The First Circuit had read RICO to prohibit only the infiltration of legitimate businesses by organized crime. *United States v. Turkette*, 632 F.2d 896, 899 (1st Cir.1980). In its view, RICO did not prohibit criminal acts by purely criminal enterprises. *Id.* The Supreme Court held that the court of appeals had "clearly departed from and limited the statutory language." *Turkette*, 452 U.S. at 581, 101 S.Ct. 2524. The Court explained:

> As a measure to deal with the infiltration of legitimate businesses by organized crime, RICO was both preventive and remedial. . . . If Congress had intended the more circumscribed approach espoused by the Court of Appeals, there would have been some positive sign that the

> law was not to reach organized criminal activities that give rise to the concerns about infiltration. The language of the statute, however—the most reliable evidence of its intent—reveals that Congress opted for a far broader definition of the word "enterprise," and we are unconvinced by anything in the legislative history that this definition should be given less than its full effect.

Id. at 593, 101 S.Ct. 2524.

The second case was *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 481, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985), in which the Second Circuit had read civil RICO to impose liability only against defendants who had been criminally convicted, and only for what the court termed "racketeering injury." The Supreme Court disagreed with both propositions. It noted that the court of appeals had narrowly construed RICO in order to avoid what that court viewed as "intolerable practical consequences." *Id.* at 490, 105 S.Ct. 3275. But the Court insisted that a "less restrictive reading" was required by the text of the statute. It wrote:

> RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, but also of its express admonition that RICO is to "be liberally construed to effectuate its remedial purposes."
>
> . . . .
>
> Underlying the Court of Appeals' holding was its distress at the "extraordinary, if not outrageous," uses to which civil RICO has been put. Instead of being used against mobsters and organized criminals, it has become a tool for everyday fraud cases brought against "respected and legitimate 'enterprises.'" Yet Congress wanted to reach both "legitimate" and "illegitimate" enterprises. The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. . . .

> It is true that private civil actions under the statute are being brought almost solely against such defendants, rather than against the archetypal, intimidating mobster. Yet this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress.

Id. at 497-98, 499, 105 S.Ct. 3275 (citations omitted).

The third case was *National Organization for Women v. Scheidler*, 510 U.S. 249, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994), in which the Seventh Circuit had read civil RICO to provide liability only when acts of a RICO enterprise had an economic motive. The Supreme Court refused to read such a limitation into the statute. It wrote,

> In *United States v. Turkette*, we faced the analogous question whether "enterprise" as used in § 1961(4) should be confined to "legitimate" enterprises. Looking to the statutory language, we found that "[t]here is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact."
>
> . . .
>
> The parallel to the present case is apparent. Congress has not, either in the definitional section or in the operative language, required that an "enterprise" in § 1962(c) have an economic motive.

Id. at 260-61, 114 S.Ct. 798 (citations omitted).

The fourth case was *Cedric Kushner Promotions v. King*, 533 U.S. 158, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001), a civil RICO case in which the Second Circuit had held that the president and sole shareholder of a corporation could not be a "person" who "conduct[s] or participate[s] . . . in the conduct of [the corporate] enterprise's affairs." *Id.* at 160, 121 S.Ct. 2087 (quoting 18 U.S.C. § 1962(c)) (ellipsis in original; brackets added). In the view of the court of appeals, the

president and sole shareholder was therefore not a "person" made liable under RICO. *Id.* at 161, 121 S.Ct. 2087. The Supreme Court disagreed with this narrow construction. Characterizing the question as whether the president and sole shareholder (the "person") was legally distinct from the corporation (the "enterprise"), the Court wrote, "The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. And we can find nothing in the statute that requires more 'separateness' than that." *Id.* at 163, 121 S.Ct. 2087.

We take from these cases the general instruction that we should not read the statutory terms of RICO narrowly. Rather, as the Court wrote in *Sedima*, "RICO is to be read broadly." 473 U.S. at 497, 105 S.Ct. 3275. As Congress admonished and as the Court repeated in *Sedima*, RICO should "be liberally construed to effectuate its remedial purposes." *Id.* at 498, 105 S.Ct. 3275; RICO § 904(a).

B. Plaintiffs' Suit

Plaintiffs allege that defendants have violated two provisions of RICO. First, they allege violation of 18 U.S.C. § 1962(c), which provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Second, they allege violation of 18 U.S.C. § 1962(d), which provides:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

In the posture of this appeal, the survival of plaintiffs' claim under § 1962(c) will ensure the survival of their claim under § 1962(d). *See Howard v. Am. Online Inc.*, 208 F.3d 741, 751 (9th Cir.2000). We therefore address, in the remainder of this opinion, only plaintiffs' claim under § 1962(c).

To state a claim under § 1962(c), a plaintiff must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima*, 473 U.S. at 496, 105 S.Ct. 3275 (footnote omitted). The only questions presented in this appeal concern requirements (2) and (4). First, Microsoft and Best Buy contend that plaintiffs have not alleged an "associated in fact" "enterprise" under RICO. Second, Microsoft and Best Buy contend that while plaintiffs have properly identified wire fraud as a predicate act of "racketeering activity," they have not pled fraud with particularity. We address these two contentions in turn.

1. Associated-in-Fact Enterprise

The definition of "enterprise" in the text of RICO is fairly straightforward. In its entirety, the definition is as follows: "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). As is evident from the text, this definition is not very demanding. A single "individual" is an enterprise under RICO. Similarly, a single "partnership," a single "corporation," a single "association," and a single "other legal entity" are all enterprises. At issue in this case is the last kind of enterprise listed in the definition—a "group of individuals associated in fact." It is undisputed that a corporation can be an "individual" for purposes of an associated-in-fact enterprise. What is disputed is the manner in which a group must be associated.

a. *United States v. Turkette*

In *United States v. Turkette*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981), the only Supreme Court case directly on point, defendants were alleged to have been an associated-in-fact enterprise within the meaning of §§ 1961(4) and 1962(c). In the words of the statute, they were alleged to have been a "group of individuals associated in fact" for the purpose of engaging in acts constituting "a pattern of racketeering activity." The First Circuit had agreed with defendants that RICO was designed "solely to protect legitimate business enterprises from infiltration by racketeers and that RICO does not make criminal the participation in an association which performs only illegal acts and which has not infiltrated or attempted to infiltrate a legitimate enterprise." *Id.* at 579-80, 101 S.Ct. 2524. The Supreme Court reversed, holding that a "group of individuals associated in fact" was an enterprise under RICO even if the purpose of the enterprise was exclusively criminal. *Id.* at 593, 101 S.Ct. 2524.

In the course of its analysis, the Court refuted various analytic mistakes by the court of appeals. The First Circuit's conclusion that RICO did not apply to wholly illegal enterprises depended in part on its reasoning that a contrary holding would render portions of the statute superfluous. The court of appeals had stated,

> "If 'a pattern of racketeering' can itself be an 'enterprise' for purposes of section 1962(c), then the two phrases 'employed by or associated with any enterprise' and 'the conduct of such enterprise's affairs through [a pattern of racketeering activity]' add nothing to the meaning of the section. The words of the statute are coherent and logical only if they are read as applying to legitimate enterprises."

Turkette, 452 U.S. at 582, 101 S.Ct. 2524 (quoting *United States v. Turkette*, 632 F.2d 896, 899 (1st Cir.1980) (alteration in original)).

The Supreme Court was at pains to correct the court of appeals' reading of the statute. It wrote:

> [The court of appeals' conclusion] is based on a faulty premise. That a wholly criminal enterprise comes within the ambit of the statute does not mean that a "pattern of racketeering activity" is an "enterprise." In order to secure a conviction under RICO, the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. *The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages.*

Id. at 583, 101 S.Ct. 2524 (citation omitted; emphasis added).

In context, this passage from *Turkette* is easy to understand. The court of appeals had mistakenly equated the term "enterprise" with the term "pattern of racketeering activity." The Supreme Court pointed out that the terms refer to two concepts that are "separate and apart" from one another: The "enterprise" is the actor, and the "pattern of racketeering activity" is an activity in which that actor engages. *See id.* These separate concepts can be expressed grammatically: As used in the italicized passage in *Turkette*, "enterprise" is the subject, and "pattern of racketeering activity" is part of the

predicate. Actions that form the "pattern of racketeering activity" are often referred to as "predicate" acts, though likely not in the grammatical sense. *See, e.g., Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1168 (9th Cir.2002); *Howard*, 208 F.3d at 746. In the words of the Court, italicized above, "The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages." *Turkette*, 452 U.S. at 583, 101 S.Ct. 2524.

Turkette further explained that proof of a "pattern of racketeering activity" is not, by itself, proof of an "enterprise." *Id.* "Enterprise" and "pattern of racketeering activity" are separate elements that require separate proof. In the words of the Court, "[t]he existence of an enterprise at all times remains a separate element which must be proved by the Government." *Id.* (stating that "[w]hile the proof used to establish these separate elements [of 'enterprise' and 'pattern of racketeering activity'] may in particular cases coalesce, proof of one does not necessarily establish the other").

b. Confusion in the Lower Courts

The Court's explanation of the meaning of an associated-in-fact enterprise in *Turkette* has not been clearly understood in the lower courts, including our own. We have taken this case en banc to correct and clarify our case law.

Four circuits have read the language in *Turkette* to require that an associated-in-fact enterprise have some kind of ascertainable separate structure. The formulations vary among these circuits, but they all require that there be an ascertainable organizational structure beyond whatever structure is required to engage in the pattern of illegal racketeering activity. *See, e.g., Asa-Brandt, Inc. v. ADM Investor Servs., Inc.*, 344 F.3d 738, 752 (8th Cir.2003) ("enterprise must have . . . an ascertainable structure distinct from the pattern of racketeering"); *United States v. Sanders*, 928 F.2d 940, 944 (10th Cir.1991) ("enterprise" requires evidence of "an ascer-

tainable structure that exist[s] apart from the commission of racketeering acts"); *United States v. Tillett*, 763 F.2d 628, 632 (4th Cir.1985) ("enterprise" requires evidence "to show that the organization had an existence beyond that which was necessary to commit the predicate crimes" (citations omitted)); *United States v. Riccobene*, 709 F.2d 214, 223-24 (3d Cir.1983) ("enterprise" must have "an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses"); *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir.1982) (proof of ascertainable structure "might be demonstrated by proof that a group engaged in a diverse pattern of crimes or that it has an organizational pattern or system of authority beyond what was necessary to perpetrate the predicate crimes").

The Seventh Circuit requires that there be "some" kind of ascertainable structure, but it does not require that it be a separate structure. *See, e.g., Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 644 (7th Cir.1995) (requiring proof of "an ongoing structure of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making" (internal quotation marks and citation omitted)); *see also United States v. Rogers*, 89 F.3d 1326, 1337-38 (7th Cir.1996) (imposing "some" structural requirements, but concluding that it would be "nonsensical to require proof that an enterprise had purposes or goals separate and apart from the pattern of racketeering activity").

By contrast, four circuits have rejected any requirement that there be an "ascertainable structure," separate or otherwise, for an associated-in-fact enterprise. *See, e.g., United States v. Patrick*, 248 F.3d 11, 19 (1st Cir.2001) ("Since Congress intended the term 'enterprise' to include both legal and criminal enterprises, and because the latter may not observe the niceties of legitimate organizational structures, we refuse to import an 'ascertainable structure' requirement

into jury instructions." (citation omitted)); *United States v. Perholtz*, 842 F.2d 343, 354 (D.C.Cir.1988) (concluding that enterprise is "established by common purpose among the participants, organization, and continuity"); *United States v. Cagnina*, 697 F.2d 915, 921 (11th Cir.1983) ("*Turkette* did not suggest that the enterprise must have a distinct, formalized structure."); *United States v. Bagaric*, 706 F.2d 42, 56 (2d Cir.1983) (stating that "it is logical to characterize any associative group in terms of what it *does*, rather than by abstract analysis of its structure" (emphasis in original)), *abrogated on other grounds by Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994).

Our own circuit has equivocated on whether an associated-in-fact enterprise must have an ascertainable separate structure and, if so, what functions that structure must serve. *See, e.g., United States v. Feldman*, 853 F.2d 648, 659-60 (9th Cir.1988) (declining to decide whether proof of ascertainable structure is necessary for an associated-in-fact enterprise because the legitimate corporations constituting the enterprise each had organizational structures); *River City Mkts., Inc. v. Fleming Foods W., Inc.*, 960 F.2d 1458, 1461 (9th Cir.1992) (concluding that "business relationship akin to a joint venture" was sufficient to establish an associated-in-fact RICO enterprise); *Chang v. Chen*, 80 F.3d 1293, 1299 (9th Cir. 1996) (explaining that "it is sufficient to show that the organization has an existence beyond that which is merely necessary to commit the predicate acts of racketeering" and citing the Third Circuit's decision in *Riccobene*, 709 F.2d at 224). The confusion in our precedents has caused difficulties for the district courts in this circuit. *See, e.g., Hansen v. Ticket Track, Inc.*, 280 F.Supp.2d 1196, 1206 (W.D. Wash.2003) ("The Court acknowledges that the Ninth Circuit case law defining an association in fact using the 'separate structure' analysis is less than clear.").

We take this opportunity to join the circuits that hold that an associated-in-fact enterprise under RICO does not require any particular organizational structure, separate or otherwise. *See Patrick*, 248 F.3d at 19 (1st Cir.2001); *Perholtz*, 842 F.2d at 355 (D.C.Cir.1988); *Cagnina*, 697 F.2d at 921 (11th Cir.1983); *Bagaric*, 706 F.2d at 55-56 (2d Cir.1983). To the extent that our past precedent suggests the contrary, it is hereby overruled. *See, e.g., Wagh v. Metris Direct, Inc.*, 348 F.3d 1102, 1112 (9th Cir.2003); *Simon v. Value Behavioral Health, Inc.*, 208 F.3d 1073, 1083-84 (9th Cir.2000); *Chang*, 80 F.3d at 1298-99, 1301.

c. No Requirement of Separate or Ascertainable Structure

As we explain above, the Supreme Court's statement in *Turkette* that an "enterprise" is "an entity separate and apart from the pattern of activity in which it engages" is not a statement that an associated-in-fact enterprise must have some kind of separate structure. 452 U.S. at 583, 101 S.Ct. 2524. Rather, it is merely a statement of the obvious: The enterprise and its activity are two separate things. One is the enterprise. The other is its activity.

To read the Court's statement in *Turkette* as requiring that an associated-in-fact enterprise have a structure beyond that necessary to carry out its pattern of illegal racketeering activities is not only to misread the particular passage of *Turkette*. It is also fundamentally to misunderstand *Turkette's* holding. The First Circuit in *Turkette* had read RICO to impose liability only when a legitimate business was infiltrated by a criminal enterprise. In the view of the court of appeals, RICO did not impose liability on purely criminal enterprises. The Supreme Court reversed.

To require that an associated-in-fact enterprise have a structure beyond that necessary to carry out its racketeering activities would be to require precisely what the Court in *Turkette* held that RICO does *not* require. Such a require-

ment would necessitate that the enterprise have a structure to serve both illegal racketeering activities as well as legitimate activities. In other words, it would require—as the First Circuit sought to require in *Turkette*—that the enterprise have a structure serving both illegitimate and legitimate purposes. But the Court in *Turkette* held precisely the opposite. It held that a purely criminal enterprise can be an associated-in-fact enterprise within the meaning of RICO. *See also Cedric Kushner Promotions*, 533 U.S. at 164-65, 121 S.Ct. 2087 (stating that RICO "protects the public from those who would unlawfully use an 'enterprise' (whether legitimate or illegitimate) as a 'vehicle' through which 'unlawful . . . activity is committed'") (ellipsis in original; citations omitted).

Further, to require that an associated-in-fact enterprise have an "ascertainable structure"—whether that structure serves both legitimate and illegitimate activities, or only illegitimate activities—is also to misread *Turkette.* As the First Circuit stated in *Patrick*, such a requirement improperly narrows the definition of an associated-in-fact enterprise because criminal enterprises "may not observe the niceties of legitimate organizational structures." 248 F.3d at 19. There must, of course, be an associated-in-fact enterprise, as required by the statute and as explained in *Turkette.* But there is no additional requirement that the enterprise have an "ascertainable structure."

d. Criteria for an Associated-in-Fact Enterprise

The Supreme Court in *Turkette* articulated the criteria for an associated-in-fact enterprise under RICO. According to the Court, an associated-in-fact enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct." 452 U.S. at 583, 101 S.Ct. 2524. To establish the existence of such an enterprise, a plaintiff must provide both "evidence of an ongoing organization, formal or informal," and "evidence that the various associates function as a continuing unit." *Id.* We consider these criteria in turn.

i. Common Purpose

We first conclude that plaintiffs have sufficiently alleged that defendants Best Buy and Microsoft have associated for "a common purpose of engaging in a course of conduct." *Id.* According to the complaint, defendants had the common purpose of increasing the number of people using Microsoft's Internet Service, and doing so by fraudulent means. Best Buy furthered this common purpose by distributing Microsoft Internet Trial CD's and conveying its customers' debit and credit card information to Microsoft. Microsoft then used the information to activate customer accounts. These allegations are more than adequate to establish, if true, that Microsoft and Best Buy had a common purpose of increasing the number of people using Microsoft's Internet service through fraudulent means.

ii. Ongoing Organization

We next conclude that plaintiffs sufficiently alleged an "ongoing organization," either "formal or informal." *Turkette*, 452 U.S. at 583, 101 S.Ct. 2524. An ongoing organization is "a vehicle for the commission of two or more predicate crimes." *Cagnina*, 697 F.2d at 921-22 (internal quotation marks omitted) (quoting *United States v. Elliott*, 571 F.2d 880, 898 (5th Cir.1978)). According to plaintiffs, Microsoft and Best Buy formed a vehicle for the commission of at least two predicate acts of fraud. Microsoft and Best Buy established mechanisms for transferring plaintiffs' personal and financial information from Best Buy to Microsoft. That information then allowed Microsoft to activate plaintiffs' Internet accounts without their knowledge or permission. These mechanisms enabled Microsoft to bill plaintiffs improperly for MSN services in 2001, 2002 and 2003. *See United States v. Qaoud*, 777 F.2d 1105, 1117 (6th Cir.1985) (stating that "coordinated nature" of defendant's activity supported finding of RICO enterprise). The alleged cross-marketing contract between Microsoft and Best Buy provides

additional evidence of an ongoing organization. Plaintiffs allege that, in addition to the transfer of customers' information from Best Buy to Microsoft, "Best Buy agreed to promote MSN and other Microsoft products in its stores and advertising." In exchange, plaintiffs allege, "Microsoft invested $200 million in Best Buy and agreed to promote Best Buy's online store through its MSN service."

iii. Continuing Unit

Finally, we conclude that plaintiffs have alleged facts that, if proved, provide sufficient "evidence that the various associates function as a continuing unit." *Turkette*, 452 U.S. at 583, 101 S.Ct. 2524. The continuity requirement does not, in itself, require that every member "be involved in each of the underlying acts of racketeering, or that the predicate acts be interrelated in any way." *Qaoud*, 777 F.2d at 1116. Instead, the continuity requirement focuses on whether the associates' behavior was "ongoing" rather than isolated activity. *Patrick*, 248 F.3d at 19.

The allegations of plaintiffs Odom and Moureaux-Maloney describe similar methods of fraudulently charging Best Buy customers for MSN Internet accounts. Plaintiffs' allegations cover almost two years of conduct by Best Buy and Microsoft. An almost two-year time span is far more than adequate to establish that Best Buy and Microsoft functioned as a continuing unit. That several employees engaged in the activity at different times does not defeat the continuity requirement. *Cagnina*, 697 F.2d at 921 (holding that a growing membership and diversity of activities do not preclude a finding of "continuity").

iv. Conclusion

Several courts of appeals have concluded that a broad definition of an associated-in-fact enterprise would produce undesirably expansive RICO liability. For example, when the Third Circuit in *Riccobene* required that an enterprise have a

structure beyond that "necessary merely to commit each of the acts charged as predicate racketeering offenses," 709 F.2d at 224, it did so to avoid what it called the "dangers" of a broad definition. *Id.* at 221. The Third Circuit stated that it was concerned that RICO liability would extend "to situations far removed from those actually contemplated by Congress, and that federal prosecutors could use the law to invoke an additional penalty whenever they had a case involving the commission of two offenses that, coincidentally, were among those listed as 'racketeering activities.'" *Id.*

The answer to concerns like those expressed by the Third Circuit in *Riccobene* was given by the Supreme Court in *Sedima*, when it rebuked the Second Circuit for having interpreted RICO to avoid what the court of appeals had called the "'extraordinary, if not outrageous,' uses to which civil RICO had been put." 473 U.S. at 499, 105 S.Ct. 3275. The Court's response was to point to the text of the statute: "It is true that private civil actions under the statute are being brought almost solely against [legitimate] defendants, rather than against the archetypal, intimidating mobster. Yet this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress." *Id.* (footnote omitted).

In *Turkette*, the Supreme Court carefully articulated the criteria for an associated-in-fact enterprise under RICO. We do not believe that we are at liberty to add to them. Applying the criteria articulated in *Turkette*, we conclude that plaintiffs have sufficiently alleged an associated-in-fact enterprise.

2. Pleading Fraud with Particularity

Federal Rule of Civil Procedure 9(b) requires that fraud be pled with particularity. It provides: "In all averments of fraud . . . , the circumstances constituting fraud . . . shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred gen-

erally." Rule 9(b) "requires the identification of the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1400 (9th Cir.1986) (internal quotation marks omitted) (quoting *Bosse v. Crowell Collier & Macmillan*, 565 F.2d 602, 611 (9th Cir.1977)). "[T]he pleader must state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Id.* at 1401; *see also Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 541 (9th Cir.1989). While the factual circumstances of the fraud itself must be alleged with particularity, the state of mind—or scienter—of the defendants may be alleged generally. *See In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547 (9th Cir.1994) (en banc) ("We conclude that plaintiffs may aver scienter generally, just as the rule states—that is, simply by saying that scienter existed.").

"[A] wire fraud violation consists of (1) the formation of a scheme or artifice to defraud; (2) use of the United States wires or causing a use of the United States wires in furtherance of the scheme; and (3) specific intent to deceive or defraud." *Schreiber*, 806 F.2d at 1400 (citation omitted); *see also United States v. McNeil*, 320 F.3d 1034, 1040 (9th Cir. 2003). To the degree that the first requirement—the formation of a scheme or artifice to defraud—requires a showing of the defendants' state of mind, general rather than particularized allegations are sufficient. Similarly, the third requirement—specific intent to deceive or defraud—requires only a showing of the defendants' state of mind, for which general allegations are sufficient. The only aspects of wire fraud that require particularized allegations are the factual circumstances of the fraud itself.

Plaintiff Odom specifically alleges that he bought a laptop computer from a Best Buy store in Pleasant Hill, California, in May 2002; that he told the Best Buy employee when he

purchased the computer that he did not need the Trial CD and the MSN service because he already had an Internet service provider; that the employee nevertheless scanned the Trial CD and swiped Odom's credit card, thereby sending the information to Microsoft by wire and establishing an account for Microsoft's MSN service without his knowledge or permission; that Microsoft billed him for two months of the MSN service that had been provided without his knowledge or permission; and that he has not been compensated for his losses. Odom does not allege the name of the Best Buy employee who sold him the computer and established his MSN account.

Plaintiff Moureaux-Maloney specifically alleges that she bought a cell phone and a cell phone plan from a Best Buy store in Reno, Nevada, in September 2001; that the Best Buy employee scanned a Trial CD and swiped her debit card, thereby sending the information to Microsoft by wire and establishing an account for Microsoft's MSN service without her knowledge or permission; that Microsoft withdrew monthly MSN payments from her debit card account for seventeen months without her knowledge or permission; that Microsoft sent her a bill for monthly MSN services for April, May, and June 2003 after Microsoft was unable to withdraw money from her debit card account; and that Microsoft has not compensated her for losses attributable to the seventeen months of withdrawals from her account, and has continued to bill her for the three-month period in 2003. Like Odom, Moureaux-Maloney does not allege the name of the Best Buy employee who sold her the cell phone and established her MSN account.

The only arguable deficiency in Odom and Moureaux-Maloney's allegations of wire fraud is that the names of the individual Best Buy employee who established their MSN accounts are not alleged. We hold for two reasons that, in the circumstances of a retail transaction whose full consequences

are realized only months later, the employee of the store need not be named. First, it is unrealistic to expect that the retail customer would remember the name of the cash register employee. A requirement that the employee be named as a precondition of bringing suit and commencing discovery would, as a practical matter, defeat almost any suit based on such a fraud. Second, as we noted above, Rule 9(b) "requires the identification of the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." *Schreiber*, 806 F.2d at 1400. In the circumstances of this case, we have been given no reason to believe that defendants will be hampered in their defense by Odom and Moureaux-Maloney's inability to name the particular employees.

We therefore hold that plaintiffs' allegations of the circumstances of wire fraud are sufficiently particularized to satisfy the pleading requirements of Rule 9(b).

IV. Conclusion

For the foregoing reasons, we hold that plaintiffs have sufficiently alleged the existence of an associated-in-fact enterprise within the meaning of 18 U.S.C. §§ 1961(4) and 1962(c). We also hold that plaintiffs have alleged wire fraud with sufficient particularity to satisfy Rule 9(b). We therefore reverse the decision of the district court and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

SILVERMAN, *Circuit Judge*, with whom RYMER, TALLMAN, RAWLINSON, and BEA, Circuit Judges, join, concurring in the result:

I do not see how Odom's complaint successfully pleads an "enterprise" within the RICO statute.

The language in *Turkette* is the starting point. An "enterprise" is "a group of persons associated together for a

common purpose," and is proven by "evidence of an ongoing organization, formal or informal" and "evidence that the various associates function as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981).

Paragraph 34 of Odom's complaint alleges only the following with respect to defining the associated-in-fact "enterprise" element:

> Defendants's agreement that Microsoft will advertise and promote Best Buy and its online store on its MSN Internet access service and various Microsoft-owned Websites, while Best Buy will advertise and promote MSN service in its "bricks and mortar" and online stores, together with Defendants' activities in furtherance of the agreement, constitute an "enterprise" as defined in 18 U.S.C. § 1961(4).

Nothing in this paragraph fairly alleges an "ongoing organization" between Microsoft and Best Buy. It merely states that the existence of a marketing contract and the performance of that contract by two parties constitute an enterprise. Stated differently, the Complaint assumes that if two parties perform a series of "predicate acts" for each other's benefit pursuant to a commercial agreement, they *ipso facto* constitute an "enterprise."

I cannot agree. RICO targets a more sophisticated crowd: those persons or entities associated in fact with "ongoing organization"—some minimal structure, coordination, or ordering principle to distinguish them from a run-of-the-mill conspiracy. *See Chang v. Chen*, 80 F.3d 1293, 1300 (9th Cir.1996) ("A conspiracy . . . is not an enterprise for purposes of RICO."); *see also Turkette*, 452 U.S. at 589, 101 S.Ct. 2524 (noting that the declared purpose of RICO was "to seek the eradication of *organized* crime" (emphasis added and citation omitted)). This distinction is highlighted in our cases

and those of our sister circuits. *See, e.g., United States v. Patrick*, 248 F.3d 11, 19 (1st Cir.2001) (noting that the gang "had older members who instructed younger ones, its members referred to the gang as family, and it had 'sessions' where important decisions were made"); *United States v. Rogers*, 89 F.3d 1326, 1337 (7th Cir.1996) (asking whether the enterprise has a structure "organized in a manner amenable to hierarchical or consensual decision-making" (citation and internal quotation omitted)); *Chang*, 80 F.3d at 1299 (asking whether the enterprise's "structure . . . provide[s] some 'mechanism for controlling and directing the affairs of the group on an on-going, rather than an ad hoc, basis' ") (quoting *United States v. Riccobene*, 709 F.2d 214, 222 (3d Cir.1983)); *United States v. Perholtz*, 842 F.2d 343, 363 (D.C.Cir.1988) ("The same group of individuals who repeatedly commit predicate offenses do not necessarily comprise an enterprise. An extra ingredient is required: organization.").

There is nothing in the complaint to suggest "ongoing organization" between Best Buy and Microsoft *after* the ink dried on their alleged agreement—no partnership, joint venture, consultation, concerted action, or joint decision-making. On this score, Odom alleged nothing more than a contract and its performance. As a result, the district court correctly dismissed Odom's complaint.[1]

I reject the majority's reference to the alleged "'coordinated' behavior of the two entities"—the transfer of cus-

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[1] To the extent the complaint alleges that decisions "are made by Defendants jointly," it does not allege that the joint decision-making was sufficiently systematic to constitute "ongoing organization"—some "system of authority that guide[s] the operation of the alleged enterprise" beyond the initial contract, *Chang*, 80 F.3d at 1300, or, as the Third Circuit has aptly put the point, a "mechanism for controlling and directing the affairs of the group on an ongoing, rather than an ad hoc, basis." *Riccobene*, 709 F.2d at 222.

tomer financial information and other cross promotional activities between Microsoft and Best Buy—as satisfying the pleading requirement for "ongoing organization." *See* Maj. Op. at 552. Odom's complaint narrowly defines the "enterprise" as only the marketing agreement between Best Buy and Microsoft together and their activities in furtherance of that agreement. It is not for us to buttress paragraph 34 with facts that Odom could have, but did not allege to define the "enterprise."

Nevertheless, I vote to reverse because the district court should have granted Odom leave to amend his complaint. When the district court hinted that it was thinking about dismissing the RICO claim, plaintiffs' counsel offered to "elaborate" on how the complaint could be amended to "plead within the statute," but the district court declined to entertain additional argument on the matter. Because there may be facts which if properly pled would satisfy the RICO "enterprise" element, and given Rule 15(a)'s mandate that "leave shall be freely given," the district court's failure to do so was error.

BYBEE, Circuit Judge, joined by Judge REINHARDT, concurring:

It strikes me as outlandish that what Judge Silverman correctly describes as a "marketing contract" between Microsoft and Best Buy could subject them to a private RICO action. Slip Op. at 555 (Silverman, J., concurring in the result). But my concerns were voiced and dismissed more than twenty years ago. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-99, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). I therefore join Judge Fletcher's opinion for the court.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C03-2976P

JAMES ODOM, on behalf of himself and
all others similarly situated
Plaintiffs,

v.

MICROSOFT CORPORATION, a Washington corporation;
BEST BUY CO., INC., a Minnesota corporation,
Defendants.

ORDER DISMISSING COUNTS ONE AND TWO
OF THE FIRST AMENDED COMPLAINT

This matter comes before the Court on defendants' Motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO") and the Electronic Funds Transfer Act ("EFTA"). The Court heard oral arguments on March 12, 2004, and gave counsel leave to file additional pleadings regarding the EFTA claim. Having reviewed the papers and pleadings submitted by the parties, and having heard oral arguments by all parties, the Court hereby GRANTS IN PART the motion to dismiss with respect to the RICO claims.

BACKGROUND

This is a putative class action against defendants the Microsoft Corporation ("Microsoft") and Best Buy Stores, L.P., erroneously sued as Best Buy, Co., Inc. ("Best Buy")

(together "defendants"). Defendants entered into a joint merchandising agreement in April 2000, under which the two companies agreed to promote one another's products and to share profits from the joint marketing. One feature of the joint marketing agreement was that a trial membership to the Microsoft Network ("MSN") internet service would be included with every purchase of certain products from Best Buy stores.

This suit arises out of sales transactions at Best Buy stores during which Best Buy employees allegedly activated a "trial" MSN service account without the customer's consent or awareness. Plaintiffs allege that MSN accounts were activated without disclosure to the customer, that the customer's debit or credit card information was transmitted to Microsoft, and that upon the expiration of the trial period, customers were billed monthly for services they were as yet unaware they had been signed up for. Monthly billing continued until the customer contacted Microsoft to have the service cancelled.

Plaintiffs assert that the experiences of named plaintiffs Katherine Moreaux-Maloney and James Odom are representative of the experience of numerous customers at Best Buy stores. Named plaintiff Katherine Moreaux-Maloney bought a cellular phone and a cellular service plan in September 2001 from a Best Buy store in Reno, Nevada, and paid with a debit card. Named plaintiff James Odom bought a laptop computer in May 2002 from a Best Buy store in Pleasant Hill, California, and paid on a credit card. Plaintiffs allege that at the time of the purchase, the Best Buy employee who processed the sale transaction scanned the bar code from a compact disc ("trial CD") containing a trial membership to MSN. Scanning the trial CD automatically activated an MSN service account in the customer's name, and because the account is activated in conjunction with the customer's payment on debit or credit card, that card's information is transmitted to Microsoft.

According to the complaint, neither plaintiff was told by the Best Buy employee at the checkout counter that an MSN account was activated, or that the customer's debit or credit card information was being sent to Microsoft. Plaintiffs allege that in some cases Best Buy employees made misleading statements to prevent the customer's discovery of MSN account activation. Neither named plaintiff used the MSN service after the purchase, since neither knew that she was subscribed to the service. Ms. Moreaux-Maloney's trial subscription lasted for thirty days, while Mr. Odom's trial subscription lasted for six months. At the end of the trial period, each plaintiff was billed monthly by Microsoft on the card used for payment at Best Buy. Mr. Odom discovered the charge on his credit card bill two months after billing began. Ms. Moreaux-Maloney did not discover the monthly transfers from her bank account to Microsoft until March 2003, eighteen months after her Best Buy purchase and seventeen months after the billings began. After cancellation of the accounts, Microsoft directed plaintiffs to seek refunds from their credit card company and bank, respectively. To date, it is alleged that no plaintiff has yet been compensated in full for the amounts paid to Microsoft, interest on those amounts for the time the money was in Microsoft's possession, finance charges on amounts outstanding on credit cards, and compensation for the time and energy spent to get refunds.

PROCEDURAL BACKGROUND

The initial complaint in this case was filed on May 15, 2003, in District Court for the Northern District of California, San Francisco Division. (Dkt. No. 45, p. 31). At the same time, plaintiffs' attorneys filed state court class actions in California and Washington based on the same set of facts. The Washington State case is currently proceeding, and the California court stayed the action in that state pending further proceedings in the Washington state case.

The initial complaint in federal court raised two claims, both under RICO. (Dkt. No. 45, p. 40). On Microsoft's motion, the case was transferred to this District on October 1, 2003, under a forum selection clause in the MSN account contract activated at the time of the sale at Best Buy. (Dkt. No. 45). Microsoft struck its simultaneous Motion to Dismiss based on plaintiffs' indicated intent to amend the complaint.

Plaintiffs filed a First Amended Complaint on November 19, 2003. That complaint added named plaintiff Ms. Moreaux-Maloney, as well as claims under the Electronic Funds Transfer Act ("EFTA"), 15 U.S.C. § 1693 *et seq.*, the Washington Consumer Protection Act, R.C.W. § 19.86.010 et seq., and for unjust enrichment. (Dkt. No. 57).

This Motion to Dismiss follows the First Amended Complaint.

ANALYSIS

1. 12(b)(6) Legal Standard

A motion to dismiss under Rule 12(b)(6) will only be granted if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his complaint which would entitle him to relief." *Gilligan v. Jamco Development Corp.*, 108 F.3d 246, 248 (9th Cir. 1997). Dismissal of a complaint under a 12(b)(6) motion should be without prejudice unless it is clear that amendment could not possibly cure the complaint's deficiencies. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1296 (9th Cir. 1998), *see also Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996).

Review of a 12(b)(6) motion "is limited to the contents of the complaint . . . [and] all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Chang*, 80 F.3d at 1296 (citing *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989); *Everest and Jennings, Inc. v. American Motorists Ins. Co.*, 23 F.3d

226, 228 (9th Cir. 1994)). Conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss. *Associated Gen. Constr. v. Metro. Water District*, 159 F.3d 1178, 1181 (9th Cir. 1998).

2. Claims Under RICO, 18 U.S.C. 1962

Plaintiffs' first two claims are brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), which prohibits "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c). Subsection (d) of the same section makes it unlawful to conspire to violate any provision of RICO.

To prove a violation of RICO § 1962 (c), plaintiffs must establish the existence of an enterprise that affected interstate or foreign commerce, the defendants' employment by or association with the enterprise, that the defendant conducted or participated, directly or indirectly in the conduct of the enterprise's affairs, and that the participation was through a pattern of racketeering activity. *Imagineering, Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303, 1309-10 (9th Cir. 1992), *cert. denied*, 507 U.S. 1004 (1993). Defendants contend that plaintiffs fails to allege facts that support a finding of the existence of an enterprise or of the predicate acts of racketeering activity.

A. Existence of an "Enterprise" under RICO

RICO defines an "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). An enterprise is a group of persons associated together for a common purpose of engaging in a course of conduct, proved by evidence of an

ongoing organization, either formal or informal, and that the various associates function as a continuing unit. *United States v. Turkette*, 452 U.S. 576, 583 (1981). Though the evidence used to establish the enterprise as an entity may overlap with the evidence that proves the predicate acts of the racketeering activity, "proof of one does not necessarily establish the other." *Id.* In other words, the plaintiff must prove the existence of the enterprise as an entity separate and apart from the pattern of activity in which it engages. *Id.*

Ninth Circuit case law defining the "separate structure" requirement is less than clear. The separate structure requirement can be satisfied by a corporation's involvement in the racketeering activity because it has a legal existence and conducts legal activities distinct from the alleged racketeering activities. *Chang v. Chen*, 80 F.3d 1293, 1300 (9th Cir. 1996); *Cf. Simon v. Value Behavioral Health, Inc.*, 208 F.3d 1073, 1083-84 (9th Cir. 2000) (separate structure requirement unsatisfied by the legal corporate structures of numerous defendant insurance companies, employee benefit plans, employers, and government entities where the plaintiff did not allege a separate structure linking the defendants beyond the alleged conspiratorial behavior). The Ninth Circuit has found joint ventures between corporate entities to be RICO enterprises, but only where the joint ventures possess the required characteristics of an enterprise. *See United Energy Owners Committee, Inc. v. United Energy Management Systems. Inc.*, 837 F.2d 356, 363-64 (9th Cir. 1988); *see also Medallion Television Enterprises v. SelecTV of California. Inc.*, 833 F.2d 1360 (9th Cir. 1987). Notably, the cases where joint ventures constituted enterprises predate *Chang*, the controlling case in the Ninth Circuit. Though none is specifically overruled by *Chang*, it is evident that this Circuit's standard was less stringent prior to that ruling. *See, e.g. United Energy*, 837 F.2d at 364 (finding the enterprise "at least somewhat separate" from the racketeering activity conducted."). Thus, where an enterprise consists of a joint venture, the venture

must still meet the characteristics established in *Chang* to indicate an enterprise separate and distinct from its alleged illegal conduct.

Methods for directing group decision-making and for dispersing the proceeds of alleged illegal transactions are highly indicative of the separate structure required of a RICO enterprise. *Chang*, 80 F.3d at 1299; *Simon*, 208 F.3d at 1083-84. A structure for making decisions is characterized by a method of ongoing, rather than ad hoc control over the group's affairs. *Id.* An agreement to disburse proceeds of alleged racketeering activity does not demonstrate a disbursement structure separate and apart from the predicate acts where the funds are dispersed according to ordinary business practices. *Chang*, 80 F.3d at 1300. In *Simon v. Value Behavioral Health, Inc.*, the court's analysis considered the *Chang* characteristics of (1) a structure beyond the racketeering activity, (2) a separate system of authority guiding the enterprise's operation, and (3) a structure separate from the predicate acts to distribute the proceeds of the allegedly fraudulent transactions as factors that indicate the existence of an enterprise. 208 F.3d at 1083-84. Finding allegations of each factor absent, the court determined there was no RICO enterprise. *Id.*

Allegations of conspiracy do not state a claim under RICO § 1962(c). In *Chang*, the court found that when a member of that alleged enterprise agreed to perform his role in the alleged racketeering conspiracy, "he entered into a conspiracy to commit the predicate acts of racketeering activity." 80 F.3d at 1300. The court specified that "[a] conspiracy, however, is not an enterprise for purposes of RICO." *Id.*; *Simon*, 208 F.3d at 1083.

Plaintiffs in this case have not alleged the existence of an enterprise separate and distinct from the alleged racketeering activity. Plaintiffs argue that "[a] reasonable inference is that the account activations are implemented through a set of

personnel and procedures different from those responsible for other alliance marketing activities. . . . [i]t would be unreasonable to assume the contrary." (Dkt. No. 75 at 12). As an initial matter, the argument is entirely based on an "inference," rather than concrete factual allegations. Conclusory allegations and unwarranted inferences are not sufficient to defeat a motion to dismiss. *Associated Gen. Constr. v. Metro. Water District*, 159 F.3d 1178, 1181 (9th Cir. 1998).

Furthermore, even if plaintiffs' inference is assumed to be true for the purposes of this motion, the circumstances described in plaintiffs' pleadings do not indicate a separate enterprise under the *Chang* factors. Though there are allegations that the enterprise pursued legal activities as well as illegal ones, allegations of a separate structure that engaged in the predicate acts of mail and wire fraud are noticeably absent from the complaint. There is no allegation that there was a subset of actors carrying out illegal activities separately from those carrying out legal marketing activities. Except for the general statement that decisions guiding the enterprise are "made jointly" by Microsoft and Best Buy, there are no allegations that describe a method through which decisions are made and the performance of various participants can be guided, or a subset of executives that direct the racketeering activities. While Microsoft technicians may indeed be separate from Microsoft marketers, an additional inference is required to conclude that Microsoft technicians and Best Buy sales staff are cohorts in a separate structure.

Finally, plaintiffs' allegation that "for each MSN trial subscription activated at Best Buy, Best Buy receives a flat payment . . . [and later] receives a portion of each monthly MSN charge paid by the customer" does not indicate a structure for distributing proceeds separate from the predicate acts. The fact that defendants have agreed to split the proceeds from MSN accounts is not distinct from the act of activating and charging the accounts where, as here, a profit-sharing

arrangement is typical of a joint-merchandising agreement. In short, because the complaint does not sufficiently allege a separate enterprise, a separate system of authority from the one that directed the alleged racketeering activity, or a separate structure that disbursed proceeds from the alleged wire fraud, plaintiffs have failed to demonstrate anything more than a conspiracy—and a conspiracy does not satisfy RICO's enterprise requirement.

Since plaintiffs do not state a claim for a violation of § 1692(c), their claim for conspiracy to violate that section necessarily fails. A claim under subsection (d) is dependent on a claim under one of the previous subsections. *Wagh v. Metris Direct, Inc.*, 348 F.3d 1102, 1112, as amended by 352 F.3d 1187 (9th Cir. 2003); *Simon v. Value Behavioral Health. Inc.*, 208 F.3d 1073, 1084 (9th Cir. 2000); *see also Howard v. America Online Inc.*, 208 F.3d 741, 751 (9th Cir. 2000), *cert. denied*, 531 U.S. 828 (2000).

B. Pleading Predicate Acts of Racketeering Activity with Sufficient Particularity

Defendants' second basis for dismissal of the RICO claims is that plaintiffs have not plead with sufficient particularity that either Microsoft or Best Buy engaged in racketeering activity, specifically in the predicate act of wire fraud. A wire fraud complaint must allege (1) the existence of a scheme to defraud; (2) the defendant's knowing or intentional participation in the scheme; (3) specific intent to deceive or defraud; and (4) the use of the U.S. wires or causing a use of U.S. wires in furtherance of the scheme. *Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1400 (9th Cir. 1986); *Perez v. Volvo Car Corp.*, 247 F.3d 303, 312-313 (1st Cir. 2001). Wire fraud allegations are subject to the pleading requirements of Federal Rule of Civil Procedure 9(b). *Schreiber*, 806 F.2d at 1401. Defendants argue that plaintiffs make only conclusory allegations and fail to describe with any particularity the defendants' respective roles in the

scheme, scienter on the part of either defendant, or an intent to deceive or defraud customers by either Best Buy sales staff or their supervisors.

Plaintiffs have not alleged facts that connect Microsoft to actions by Best Buy employees, nor have they specified the Best Buy policy under which the allegedly fraudulent acts are taken. Facts that indicate Microsoft's notification of consumer displeasure after the alleged fraud took place does not suffice to demonstrate Microsoft's knowledge or participation in a plan to defraud. Though specific intent may be averred generally from the scheme itself, it must be predicated on factual allegation of a scheme. *See Sun Savings and Loan Association v. Dierdorff*, 825 F.2d 187, 195-96 (9th Cir. 1987); *Schreiber*, 806 F.2d at 1400. Because plaintiffs have not alleged the existence of a scheme or the defendant corporations' knowledge and intent in executing that scheme, the predicate acts of racketeering have not been established.

CONCLUSION

The Court concludes that plaintiffs have not met their burden under the requirements of Federal Rules of Civil Procedure 12(b)(6) and Rule 9(b) to allege facts supporting claims under RICO. The Court therefore GRANTS defendants' motion to dismiss and DISMISSES claims One and Two of the First Amended Complaint.

The Clerk is directed to send copies of this order to all attorneys of record.

Dated: March __, 2004.

_____

Marsha J. Pechman
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed JUN 4, 2007]

No. 04-35468
D.C. No. CV-03-02976-MJP
Western District of Washington, Seattle

JAMES ODOM,
Plaintiff - Appellant,

v.

MICROSOFT CORPORATION, a Washington corporation;
BEST BUY CO., INC., a Minnesota corporation,
Defendants - Appellees.

ORDER

Before: W. FLETCHER, *Circuit Judge.*

Upon due consideration of Appellee Microsoft's motion to stay the mandate of this Court pending the filing of a petition for writ of certiorari, such petition to be filed within 90 days of this Order,

IT IS ORDERED that the motion to stay of mandate be GRANTED.*

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* In the event that the petition for writ of certiorari is timely filed, "the stay shall continue until final disposition by the Supreme Court." Fed. R. App. P. 41(d)(2)(B).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed JUN 28, 2007]

No. 04-35468
D.C. No. CV-03-02976-MJP
Western District of Washington, Seattle

JAMES ODOM,
Plaintiff - Appellant,

v.

MICROSOFT CORPORATION, a Washington corporation;
BEST BUY CO., INC., a Minnesota corporation,
Defendants - Appellees.

ORDER

Before: W. FLETCHER, *Circuit Judge.*

Plaintiff-Appellant's motion for reconsideration of the order granting the stay of mandate, filed June 6, 2007, is hereby DENIED.

APPENDIX E

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

[Filed Sept. 28, 2006]

No. 04-35468

JAMES ODOM,
Plaintiff-Appellant,

v.

MICROSOFT CORPORATION, a Washington corporation;
BEST BUY CO., INC., a Minnesota corporation,
Defendants-Appellees.

ORDER

Before MARY M. SCHROEDER, *Chief Judge*.

Upon the vote of a majority of nonrecused regular active judges of this court,[1] it is ordered that this case be reheard by the *en banc* court pursuant to Circuit Rule 35-3.

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[1] Judges Pregerson, McKeown, Wardlaw, Gould, Clifton, Smith, and Ikuta are recused.